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September 15, 2004

Richard Schutt
Environmental Protection Agency, Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-3104

Kay Prince
Environmental Protection Agency, Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-3104

Re: Early Action Compacts in North and South Carolina

Dear Mr. Schutt and Ms. Prince,

As background for our meeting on September 27, we are enclosing copies of the documents submitted previously to the North Carolina Department of Air Quality, the South Carolina Department of Health and Environmental Control and local EAC groups. The letters and attachments set forth recommendations for improving EACs in both states.

We look forward to a productive meeting with you.

Sincerely,

David Farren
Senior Attorney

Marily Nixon
Staff Attorney

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July 30, 2004

Brock Nicholson
Deputy Director, Division of Air Quality
North Carolina Department of Environment and Natural Resources
1641 Mail Service Center
Raleigh, NC 27699-1641

Sheila Holman
Planning Section Chief, Division of Air Quality
North Carolina Department of Environment and Natural Resources
1641 Mail Service Center
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Re: Improvements to North Carolina Early Action Compacts

Dear Mr. Nicholson and Ms. Holman:

Thank you for continuing to work with us regarding the Southern Environmental Law Cetner's (SELC) ongoing concerns about North Carolina's Early Action Compacts (EACs). As you know from our previous communications, from a legal perspective we do not believe the EAC program is authorized under the Clean Air Act, and from a practical perspective we do not believe the state's EACs contain adequate measures to effectively address the ozone pollution problem in the state's nonattainment areas. However, we want to continue to work with you in an effort to strengthen the EAC program to the extent possible and we very much appreciate your willingness to hear and address our concerns. This packet of information is intended to gather in one place our recommendations for the state's EAC program.

Previously, we shared with you a document setting out SELC's general recommendations for improving all of the state's EACs. We also provided you with a detailed analysis of individual EAC provisions with recommendations for improving problematic provisions. We have now combined our general and specific recommendations into one document. See Attachment 1, "Recommendations for North Carolina EACs." We urge that all EACs be revised to meet our general and specific recommendations.

One recommendation we made in our May 2003 letter to Keith Overcash regarding North Carolina's EAC program (see Attachment 2) and repeated in our general recommendations is to include in each EAC strong provisions related to land use and vehicle miles traveled (VMT). Most of the land use or VMT-related provisions included in the North Carolina EACs have been weakened to the extent that they are unlikely to have any significant effect on air quality. We

continue to believe that strong provisions addressing mobile source emissions are critical to improving and maintaining air quality throughout North Carolina. See EPA Guidance: Improving Air Quality Through Land Use Activities, Jan. 2007. Thus, we urge each EAC to incorporate at least one strong land use measure and one strong VMT-reducing measure. We have listed examples of these measures in Attachment 3 to this letter. See Attachment 3, "Examples of VMT and Land Use-Related Measures." For the three North Carolina EACs, this goal could probably be met by strengthening existing measures, rather than necessarily adding new ones. We note that EAC measures must be *specific, quantified, permanent, and enforceable as SIP measures*. See Attachment 4, EPA's Memorandum, "Schedule for 8-Hour Ozone Designations and its Effect on Early Action Compacts," November 14, 2002.

Finally, we look forward to seeing the revised language regarding a twenty-year maintenance period for North Carolina EAC areas. When SELC and DAQ have agreed on final language, we will forward the maintenance provision to the South Carolina Department of Health and Environmental Control. Our hope is that DHEC will include the provision in South Carolina's SIP as well.

In summary, we urge that all North Carolina EACs be revised to meet our specific and general recommendations for EACs; that each EAC incorporate at least one strong land use measure and one strong VMT-reducing measure; and that the North Carolina SIP include the twenty-year maintenance provision for EAC areas once that language is finalized between SELC and DAQ.

Thank you for the opportunity to present these recommendations to you. We look forward to continuing to work with you to improve North Carolina's EAC program and to achieve clean air as soon as possible for the citizens of North Carolina.

Sincerely yours,

J. David Farren
Senior Attorney

Marily Nixon
Staff Attorney

cc: North Carolina Sierra Club (Molly Diggins)

DRAFT DATE
JULY 30, 2004

RECOMMENDATIONS FOR NORTH CAROLINA EACs

GENERAL RECOMMENDATIONS FOR ALL NC EACS

- Revise measures to ensure they *can* happen. Revise assumptions that are too aggressive. Where there is a cost associated with a control measure, quantify the cost, identify the source of funds, and commit to expend them.

- Revise measures to ensure they *will* happen. Include specific, quantified commitments. Rather than "consider" a control, commit to implementing it and give details of when and how. Include commitment to actual, realistic implementation dates and specific results. Demonstrate that the measures will be permanent.

- Revise measures to ensure they will *make a change.*

    - Distinguish controls that are already being implemented from new controls that are being used to justify deferral of the nonattainment designation. Strengthen the latter.

    - Adopt and implement land use controls with "teeth." Simply "allowing" or even "promoting" or "encouraging" mixed-use or transit-oriented development will not achieve substantive change in development patterns. Similarly, use financial incentives (e.g., bus subsidies), financial disincentives (e.g., parking fees), and parking management (e.g., limit parking supply) tools to increase transit use. EPA's guidance document, "Improving Air Quality Through Land Use Activities" (Jan. 2001), gives as examples increasing development density near transit stations and transit corridors, limiting parking supply, reserving parking close to buildings for carpools and vanpools, use of transferable development rights, setting minimum densities in central areas and around transit facilities, granting financial and non-monetary incentives for development that focuses on existing urban areas and infill, granting incentives for development that locates transit- or pedestrian-oriented amenities like housing or childcare near commercial uses and pedestrian facilities, requiring mixed uses in target areas and/or granting financial incentives for mixed uses, and requiring pedestrian-friendly design elements in new development.

    - Include measures that ensure development and transportation plans and projects do not worsen air quality ("conformity-type" measures). For example, EAC jurisdictions could amend their transportation plans to include only those projects that will not degrade air quality, or to require that any project that will degrade air quality is preceded by a project that will improve air quality. Additionally, EAC jurisdictions could amend their development codes to prohibit approval of zoning and/or subdivision applications unless the applicant demonstrates that the project, along with related and projected traffic impacts, will not harm air quality.

TRIAD EAC

General Recommendations

- Several of the measures are steps that have already been taken and whose contribution to air quality improvements will already have been reflected in monitoring results for 2001-2003. They add nothing to improve air quality in future.

- Several of the measures are based on what appear to be aggressive assumptions. These should be carefully analyzed and the quantifications double-checked. In certain cases emissions reductions are quantified even though substantial uncertainty exists about how and when the measure will be implemented. In these cases, the uncertainties should be minimized by getting commitments from local governments (and in some cases other parties, such as NCDOT) as to funding and completion of measures. Otherwise, the assumptions should be revised downward to reflect a more realistic result.

Local Government Initiatives

Buy low emissions fuel, vehicles, and equipment. Measure A1 is to replace gas vehicles as needed "and/or reduce dependence on old higher emissions vehicles." This measure is tied to quantified NOx and VOC emissions reductions. However, the language "and/or reduce dependence" is too vague and impossible to quantify. As a result the emissions reductions quantifications are suspect. Also, the replacements are "as needed" and would happen with or without an EAC program, so this provision does not provide anything additional to the status quo. A2 through A4 have the same "and/or reduce dependence" language. These provisions are already mandated by the state. Measure A5 is the purchase of lower emission fuel – Greensboro converted all its diesel vehicles to biodiesel, but this happened in spring 2003. Any resulting improvements in air quality have already been realized, so this provision adds nothing to the status quo.

Reduce emissions on large public construction projects. This measure depends expressly on NCDOT to develop the program; the "Implementation Date" column reads: "Include only if we think it will be implemented by state DOT." NCDOT commitment should be obtained or the measure should be deleted. Also, local governments should themselves develop enforceable policies requiring emissions reductions for construction work on local government projects that do not involve state highways.

Use and support public transportation. Measure A8 projects large NOx and VOC reductions based on increasing ridership on local and regional buses in Guilford and Forsyth counties. The projected increase in riders is 50% per year. This seems unrealistically high. Also, the measure is described as "ongoing." The EAC should clarify what ridership changes (and related emissions reductions) have occurred thus far and justify its aggressive projections for the future. Measure A9 deals with park and ride lots and purports to quantify emissions from building new lots. The EAC states that the regional transportation service has "funds on hand" to build 20 park and ride lots, but states only that 5 lots will be built or leased in 2004, and also says that

some of the lots (the remaining 15?) will be built *contingent upon 10% local match*. To support the quantification of emissions reductions, the EAC should include confirmation that all 20 lots will be built, where, and when, as well as confirmation that the local match funds have been committed for the balance of the lots.

Promote options to single occupancy vehicles. Measure A10 quantifies emissions reductions based on a 25% increase in ride sharing and vanpool programs per year. This assumption seems aggressive; if it cannot be supported, the quantification of emission reductions should be adjusted. Measures A12 and A13 consist of ongoing feasibility studies for HOV lanes and rapid transit. These measures are ongoing and add nothing to near-term air quality improvement.

Additional public transportation measures. This section lists measures such as improving transit systems, adding bus stops, etc. but contains no specific commitments as to any of these measures. It should be revised to state specifically what action will be taken, by whom, and when, and where the funds will come from. For measure A15, which consists of "add[] bus stops at employers," the "Implementation Date" column states, "Depends on ridership; currently down due to manufacturing job losses." This language shows that this measure is not a commitment to do anything at all. Measure A16 relates to mass transit passes or allowances. "Promoting" the purchase of passes and "considering" employer purchase or allowance is not enough to produce results. This measure should include commitments from local governments to provide passes or allowances as incentives to employees to use transit.

Emissions Reductions Reported and in Process by Industries and Utilities

Measures B1 and B2 are not reduction measures. Rather, they are arguments why the EAC jurisdictions think the state's air quality information is wrong. They should be deleted from the EAC. Measure B3 provides that an R.J.R. Reynolds Tobaccoville facility will eliminate use of coal-fired boilers during ozone season years 2004 through 2007. However, there is no commitment beyond that date so the measure is by its terms not permanent. There is also a column appearing to show reductions for 2008 even though the commitment expressly ends in 2007. The facility should commit to permanent elimination of coal-fired boiler use during ozone seasons. Measure B4 consists of steps a company has already taken in the area of operations efficiency – these will not provide additional air quality improvements in future. Measure B5 consists of a mix of steps that have already been taken and a statement that the company is "planning to use" a smaller natural gas fired boiler "as weather permits" during the months of June through October. The language needs to be revised to create a commitment to use the smaller boiler and needs to specify the time period of the commitment. Measure B6 refers to a mobile meter reading program put into place by Duke Energy. It is listed as "completed," so if it will contribute to air quality improvements in future that contribution should be explained. Measure B8 refers to "plans expected to be submitted." The plans need to be submitted and quantified as part of the EAC commitments.

Support for Regional Initiatives

Enforce state regulations. These include open burning restrictions, supporting Triad EAC as "regional air quality consortium," and participation in Clean Cities program. These do not represent additional emissions reduction measures from steps that will be taken at the local level.

Participate in state initiated pilot projects. Same comment as above. In addition, measures C5 and C6, relating to diesel retrofits on school buses and other vehicles, are marked as "quantification for regional use only – not for inclusion in SIP." A key criterion for EAC control measures is that they be enforceable when adopted into the SIP. These measures do not meet even this most basic criterion. If they are not going to be enforceable, they should be deleted from the EAC.

Air Quality Education and Outreach

Context Issues. These measures relate to energy efficiency in buildings and systems and other energy savings and emission reduction strategies. Measure E1 sets out principles for implementing energy efficiency in facilities and equipment. It includes good ideas, but the principles are vague and there is no requirement that all EAC jurisdictions implement them. This measure would be improved by specifying required measures, not broad principles, and requiring each jurisdiction to commit to the specific measures. Measures E4 through E7 are already required by state law and are identified as having already been implemented, so they do not represent additional emissions reductions from steps that will be taken at the local level.

Maintenance Strategies (implications after 2007)

These relate to continued promotion of automobile alternatives and "coordinated and pedestrian friendly land use." Measures F2 through F4 concern encouraging non-motorized transport. The language is vague and no details are included. Specific mechanisms should be identified in detail and commitments demonstrated, especially since large NOx and VOC reductions are claimed for F2 and F3 measures. Measures F5 through F13 concern land use controls. These consist of general principles, with no detail and no commitment. No information is presented whether jurisdictions are including requirements and incentives as recommended in the EPA guidance.

FAYETTEVILLE EAC

General recommendations

- Quantify emissions reductions and/or add measures that produce quantified reductions. Only three strategies produced quantifiable emissions reductions. Of these, two (enhance mass transit system, use renewable resources) consist in whole or in part of programs that are already in place, so would not necessarily result in additional emissions reductions justifying deferral of the nonattainment designation. The third (alternative fuels and AF vehicle) includes a strategy that will actually increase NOx slightly (conversion of 185 vehicles of Fort Bragg fleet to B20), though it is projected to reduce emissions of other pollutants and PM.

- Mobile source controls are very weak. The EAC document states that "Mobile source strategies will be reviewed and evaluated for long range planning in this area."

Land Use Measures

Landscape ordinance. EAC jurisdictions promise to require landscaping of major nonresidential developments, including retrofitting older developments. The measure should provide specifics – what level of landscaping, designed for what purpose (e.g., buffer pedestrian or bike uses from cars?), etc. There is also a question how retrofitting of older developments would be accomplished. The EAC should note the specific mechanism, including what entity would pay for the retrofit.

Conduct a smart growth audit. Local governments promise to conduct a benchmark land use assessment and compare it with smart growth policies. This is a good start – but only a start. Jurisdictions should commit to identifying smart growth-type measures to adopt, including timing and funding for implementation.

Transit/Pedestrian/Mixed Use Oriented Development. This measure promises local jurisdictions will add a mixed-use alternative to zoning ordinance along transit lines, and include elements to increase the desirability of walking and biking and promote transit use. This is a good start but jurisdictions should include real incentives and requirements for mixed use, as suggested in EPA guidance document.

Infill development. These measures promise to promote infill and brownfields development in urban areas and strengthen the downtown area. Same comment as above. "Promoting" and "allowing" better development is not enough to create meaningful change. Comment that Fort Bragg is building a "majority" of projects on currently developed sites rather than on new, undisturbed sites shows the jurisdictions are not going far enough.

Shared parking facilities and connectivity. No detail is given on this measure. What are jurisdictions committing to do? Without detail, this is a meaningless provision

Urban reforestation/green space. These measures state that policies are in place to maintain tree coverage in watershed areas and public works is seeking to expand land acquisition for preservation of the watershed; NC Forest Service is seeking grant funding to plant at least 100 trees; Cumberland County is to complete a public green space inventory; and jurisdictions are considering a conservation subdivision option. These are good starts, but there is inadequate information and no commitment to carry these measures out. For example, there is no certainty that the forest service will obtain the funds or expend them on tree planting and there is no indication of funding availability for the county's green space inventory or commitment that the county will do anything in response to the inventory.

Mobile Sources

Alternative fuels and AF vehicles. This measure states Fort Bragg has a plant (or plan?) to convert its fleet to biodiesel and Ethanol, including an AF fuel station. This is a good measure but needs more detail. Is this facility in existence? If not, is there a specific commitment Fort Bragg has made to carry this out? Has it appropriated the funds?

Idling restrictions – This measure states that Festival Park will include electrical outlets for use to reduce truck idling during festivals. This is a good measure, but very limited in scope.

Retrofitting diesel school buses – Fort Bragg has a grant to fund retrofit. This is a good measure – it is specific and quantifiable and funding exists. Is there a specific commitment Fort Bragg has made to carry this out? Emissions reductions should be able to be quantified – was the modeling just not done?

Transportation

Engineering improvements for traffic management and ozone alerts. Is there a commitment to this project? Is there a commitment of funds? Emissions reductions should be able to be quantified – was the modeling just not done?

Enhance mass transit systems. Measures include redesigning routes for rider convenience, increasing frequency of service, Fort Bragg-initiated shuttle service. All are good measures but lacking in detail, commitment, and demonstration of commitment of funds. The Fort Bragg shuttle is "ongoing" – if it is already in place the shuttle may not improve air quality in future.

Formulate car and vanpooling. Measures include development of database to connect riders, advertisement of service, and expansion of rural paratransit transportation.

Encourage park and ride for large events. This is an "ongoing" project – it may not improve air quality in future. Shuttles are provided "at nominal cost" by FAST and private providers – charging a fee will discourage use. Emissions reductions should be able to be quantified – was the modeling just not done?

Conservation

Use renewable resources when available. Measures state Cumberland County landfill harvests and sells methane gas; EAC jurisdictions encourage residents and businesses to support NC Green Power. The methane gas reuse is a good measure but could be improved by a commitment to the increased amount of gas the EAC says can be reused in future.

Retrofitting of public buildings. Measure says the county will enter into "Guaranteed Energy Savings Contract" for evaluation and upgrade of buildings, equipment, and material; "PWC" is a member of "Good Cents" housing program; and Fort Bragg is implementing energy reduction. The energy savings contract is a good measure, if the county is obligated to implement the upgrades identified by the contract. Is it?

Encourage construction and use of energy efficient equipment, promote purchase of green/less polluting products. Fort Bragg is the only entity cited as implementing energy reduction strategies. Other jurisdictions should commit to implementing them as well, and should commit to encouraging similar measures among local businesses.

Awareness

These measures include student outreach, public education at community events and churches, speakers bureau, air quality web page, promoting bus ridership for youth, air quality educational system at local libraries, air quality poster/essay contest for schools, and discouraging open burning on Ozone Alert days. While these are laudable activities, they are unlikely to produce any direct air quality improvement. In addition, several of these are ongoing programs, not programs that would improve air quality in the near term and thereby justify a deferral of the nonattainment date.

UNIFOUR EAC

General recommendations

- The EAC does not include a single measure that produces quantifiable emissions reductions. The EAC jurisdictions should be required to include such measures.

- The Unifour EAC includes no provisions relating to reduction of emissions from vehicles (either on-road, off-road, or related equipment). Rather, the EAC area appears to rely on federal programs for reducing vehicle emissions. At a minimum, the local governments should commit to replacing fleet vehicles to biodiesel or hybrids.

- Purely educational measures should not form the basis of the program. Strengthen existing measures that could produce quantifiable emissions reductions by adding detail and commitment, and add more of these measures.

- Each of the resolutions by the local governments commits only to use "applicable" strategies from the ozone control measures list "as policy guidelines" in decision making. The local governments should make express commitments to implement all of the control measures.

- The land use measures referred to in the EAC should be strengthened to have "teeth," along the lines of examples given in EPA guidance.

Recommendations on Specific EAC Measures

Local governments participate with private sector in NC Air Awareness Program. Little tangible air quality improvement likely to result.

Enhanced ozone awareness. Little tangible air quality improvement likely to result.

Evaluate the benefits of participation in the Clean Cities program. This measure includes no commitment to participate in the program. Even if local governments make the decision to join, the program is completely voluntary and thus unlikely to result in tangible air quality benefits.

City and County energy conservation plan. This measure should include enforceable commitments from local governments to complete these plans by a certain date and comply with their terms. Penalties for noncompliance with the plan should be included.

Assign staff to be air quality contact. No tangible air quality improvement likely to result.

Adopt a local clean air policy and appoint a stakeholder group to identify and recommend locally feasible air improvement actions. The EAC lists the "clean air policy" as a strategy but includes no reference to it in the description of the project. The policy should be drafted and adopted by all jurisdictions or this measure is nugatory and should be removed from the EAC. Note that the column labeled "Resource Concerns/Constraints" says "Need outside expertise to develop plans." This potential "out" should be eliminated. The local governments should identify funds to implement this measure.

Landscaping standards. There is no requirement that the local governments adopt standards and no time frame. There are no minimum criteria that all local governments should adopt. The excerpts from local codes indicate the local governments are simply adopting standard/minimal landscaping standards, rather than aggressive measures to improve air quality. The project description states, "riparian buffers regulations should also be supported," but there is no description of what these need to contain and no requirement that they be adopted.

Implement smart growth, mixed use, and infill development policies. The description of the strategy is to "encourage" compact development. The actual code provisions overall only *allow* better development rather than actively encouraging or requiring it. All governments should adopt code revisions that include incentives and requirements for compact development, consistent with EPA's guidance document, "Improving Air Quality Through Land Use Activities."

Develop plans to encourage bicycle and pedestrian usage. These plans should be finalized prior to December and financial commitments made to implement provisions.

Discourage open burning on Ozone Action Days. This is an entirely voluntary provision; there is no guarantee of air quality improvement. Also, it is not very ambitious. Local governments should impose a county-wide open burning ban during the entire ozone season. At a minimum, the existing measure should be revised to include incentives to get contractor sign-on.

Support coordination of MPO and RPO efforts. No tangible air quality improvement likely to result. Language is vague and includes no commitments.

Encourage the use of compressed work weeks or flexible work hours. This measure is vague and holds no commitments, and is unlikely to result in tangible air quality benefits. Who is going to be encouraged, and how? Local governments should commit to instituting a flex schedule/compressed work week for their own employees and encourage employees to use it.

Expand transit and ridesharing programs. This measure is vague and holds no commitments. Local governments should use incentives (e.g., provide preferred parking or flex schedules for carpool participants) and disincentives (limited parking on-site) to increase use of these programs, as discussed above and in the EPA guidance document, "Improving Air Quality Through Land Use Activities." Local governments should commit to expenditures and time frames for these programs.

Improve traffic operational planning, engineering and maintenance. No details or commitments are given, other than to "expand" technologies. This measure should be strengthened. EAC jurisdictions should commit to making specific changes and appropriating the funds to carry them out.

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May 20, 2003

B. Keith Overcash, Director
NC Division of Air Quality
1641 Mail Service Center
Raleigh, NC 27699-1641

RE: Ozone Early Action Compact in North Carolina

Dear Mr. Overcash:

The Southern Environmental Law Center is writing to address the efforts of several North Carolina localities to develop Early Action Compacts ("EACs") with the U.S. Environmental Protection Agency ("EPA") as a substitute to Clean Air Act ("CAA" or "the Act") requirements regarding the implementation of the 8-hour ozone standard adopted by EPA in 1997. The North Carolina localities involved are the Piedmont-Triad area (including 11 counties and Wintson-Salem, High Point, and Greensboro), the Mountain area (including 5 counties and Asheville), the Unifour area (including 4 counties and Hickory and Morganton), and Fayetteville.

As you know, the EAC program is designed to allow areas to avoid the consequences of forthcoming nonattainment designations under the revised 8-hour air quality standard for ozone in exchange for their participation in an experimental effort to bring these areas into attainment through local air pollution control measures. Under this program, EPA has established a series of required milestones each compact signatory must meet in order to remain eligible for the deferred effective date of the nonattainment designation. An important upcoming deadline requires the State and local governments in potential nonattainment areas to submit lists of proposed local air quality improvement measures to EPA no later than June 16, 2003.

While we applaud the goal of proactively addressing the serious public health threat of ozone pollution, we have serious concerns about the potential effectiveness of any EAC that would fail to provide strategies and safeguards equivalent to the statutory scheme established by Congress. As shown in the recently released American Lung Association 2003 State of the Air Report,[1] the public health threat posed by ozone is especially severe in North Carolina, which is home to 3 of the 25 most ozone-polluted cities in the country and received failing air quality grades for 27 of 33 counties studied. The Triad area, which is one of the proposed EAC participants, ranked 17th on the Lung Association's list of most polluted cities, with continued

[1] Available at http://www2.lungusa.org

increases in its violation days pushing it up from number 21 in 2001 and 25 in 2000. As three counties of the eleven-county proposed EAC area for the Triad were designated nonattainment areas under the less health-protective 1-hour ozone standard, and are now considered "maintenance" areas, we are especially concerned about air quality progress under the Triad EAC.

To overcome North Carolina's discouraging rankings and poor air quality history, EAC participants must take aggressive actions to reverse these trends. On the heels of the passage of the Clean Smokestacks Act, which will go a long way toward cleaning the state's coal fired power plants, Governor Easley has recently recognized that an equally aggressive effort should be made to control mobile source emissions, the other major source of nitrogen oxide ("NOx") and volatile organic compounds ("VOC"), the two key ozone precursors. SELC agrees and believes it is essential that EACs include binding commitments by the State and local governments to address vehicle miles traveled ("VMT") through transportation and land use strategies that have been demonstrated to be effective in reducing NOx and VOC emissions. The basis for our recommendation is discussed in detail below.

I. BACKGROUND TO EAC PROGRAM

As an initial matter, it is important for all involved communities to understand that the EAC program exists outside the structure of the federal Clean Air Act and allows unauthorized exemptions from some of the Act's fundamental requirements. EPA, however, has presented this program as a way to achieve "clean air sooner," and that is certainly a goal we share. Our hope is that communities will take this opportunity to adopt meaningful, enforceable, and permanent measures that will clean the air their residents breathe, regardless of their involvement with the EAC program. Equally important, we believe that it will be necessary for communities to make an exceptionally compelling showing of effective air quality improvement strategies to avoid future controversy and potential litigation over the adoption of an EAC.

Under the EAC program, EPA has proposed that an area which currently meets the 1-hour standard for ozone but will likely fail to meet the 8-hour standard may avoid the legal ramifications of a nonattainment designation by meeting certain requirements. As presented by EPA, these requirements include affirming an intent to participate in a compact by December 31, 2002, submitting a local plan to EPA by March 2004, adopting the local measures into the State Implementation Plan ("SIP") and submitting the revised SIP to EPA by December 2004, implementing the local controls and providing progress reports to EPA through 2005-06, and attaining the air quality standard for ozone by December 2007. If an area complies with these milestones, EPA asserts that the area will be reclassified as attainment without ever facing the statutory obligations of a nonattainment area. If an area misses one of the milestones, the area will automatically reenter the normal CAA process applicable to 8-hour nonattainment areas. Also, if the EAC fails to achieve attainment of the 8-hour standard by the end of 2007, a revised SIP meeting all the requirements of the CAA would be due in December 2008, one year later than the SIP deadline for nonattainment areas that do not participate in the EAC program.

The primary statutory obligations EPA has advertised as avoidable under the EAC program are the "New Source Review," "Transportation Conformity," and "Maintenance Plan" requirements contained in the CAA. "New Source Review" and "Conformity" are two of the most important tools in the Act for reaching attainment of the health based pollution standards, addressing stationary and mobile sources respectively. The "Maintenance Plan" requirement is designed to ensure that an area does not fall back into nonattainment over time.[2]

New Source Review

Under "New Source Review," new or expanding major stationary sources in nonattainment areas are subject to a series of controls. First, the class of "major" sources which must receive a CAA permit from the state in order to operate is expanded from those that emit at least 250 tons of a criteria pollutant per year to sources that emit at least 50 tons of pollution per year.[3] Second, new and modified major sources within the nonattainment area are required to secure offsets of emissions from existing sources.[4] Finally, sources subject to "New Source Review" are required to install what is known as "lowest achievable emissions reductions" or "LAER" technology, rather than the "best available control technology" or "BACT" that is required of sources located in attainment areas.

As evidenced by this brief description, each of the "New Source Review" requirements is designed to ensure that growth in stationary sources does not mean growth in pollution. These provisions are essential to ensuring that emissions from stationary sources do not exacerbate a nonattainment area's air pollution problems. Even in North Carolina, which has shown a commitment to halting the state's stationary source pollution problem through passage of the Clean Smokestacks Act in 2002, NSR has a significant role to play. Not only does NSR extend beyond coal fired power plants, the only source type covered by the Clean Smokestacks Act, but it also requires new sources to acquire emissions offsets, whereas the Clean Smokestacks Act applies to existing sources only. Any local area that is serious about cleaning its air, yet seeking to avoid this important requirement in the CAA, must not simply rely on the actions of the state legislature, but rather make its own meaningful efforts to control NOx and VOC emissions through other means.

Under the EAC approach, nonattainment areas avoid the near-immediate imposition of New Source Review, which would otherwise take effect in 2004. If the EAC proves to be ineffective to meet the 8-hour standard by December 2007, New Source Review would not take effect until 2008, resulting in a four-year delay of this important requirement.

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[2] As mentioned above, Davidson, Guilford, and Forsyth Counties, all in the proposed Triad EAC, are "maintenance" areas for the 1-hour standard. As such, they must continue to comply with the maintenance and conformity requirements despite their participation in the EAC process.

[3] CAA § 175(c)(5), 42 U.S.C. § 7502(c)(5); CAA § 182(a)(2)(C)(i), 42 U.S.C. § 7511(a)(2)(C)(i).

[4] CAA § 182(a)(4), 42 U.S.C. § 7511(a)(4).

Transportation Conformity

Nonattainment areas are also required by the Act to conduct "conformity" analyses to ensure that transportation plans and highway projects conform to the State Implementation Plan for achievement of the 8-hour standard and that federal funds are not used in a way that would adversely impact air quality.[5] In larger metropolitan areas, where emissions from motor vehicles typically constitute the largest portion of total anthropogenic NOx and VOC emissions, transportation conformity is a powerful tool designed to control the portion of emissions contributed by mobile sources due to ever-increasing VMT. Regions that are unable to demonstrate conformity enter what is known as a "conformity lapse," where new capacity-expanding highway projects are halted in favor of "transportation control measures" and "exempt projects" that will not exacerbate air quality violations.[6] For example, the Atlanta metropolitan area experienced a conformity lapse in the late 1990s, resulting in a significant redirection of transportation funds from highways to transit and other projects that help to improve air quality. In North Carolina, the Charlotte metropolitan area experienced its own conformity lapse from 1997 to 1999.

With an EAC, nonattainment areas avoid this important conformity requirement which would otherwise take effect in 2005. If the EAC fails to produce the necessary reductions by the end of 2007, conformity would come into affect the following year, yielding a three-year delay in this important requirement.

As discussed in detail below, transportation and land use strategies are readily available to local governments and can help them make significant strides in cleaning their air, reducing congestion, preserving open space, addressing non-point water pollution, and generally improving the quality of life for their residents. Although the "conformity" mechanism contained within the Act presents an important federal incentive for ensuring that transportation investments and related land use development patterns do not hinder the attainment of the health based air quality standards, local commitment to halting the growth of VMT through transportation and land use policies and initiatives can also play a significant role in an area's air pollution control strategy. Indeed, as discussed below, transportation and land use controls that focus on reducing per-capita VMT should be the primary strategy for controlling NOx and VOC emissions in North Carolina's metropolitan areas.

Maintenance Plans

EPA Region 4 has suggested that if a participating area demonstrates attainment by December 2007, the twenty-year maintenance plan required under Section 175A of the CAA also would be inapplicable. Instead, the compact signatories would replace the twenty-year maintenance period with a 5-year, or perhaps 10-year, monitoring program.

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[5] CAA § 176(c), 42 U.S.C. § 7506(c).

[6] 42 U.S.C. § 7506(c)(4)(B)(ii) and 40 C.F.R. § 93.104(b)(3) and (c)(4) (EPA conformity regulations); see 42 U.S.C. § 7408(f) (identifying approvable transportation control measures) and 40 C.F.R. §§ 93.114(b), 93.115(d) and 93.126 (EPA regulations on projects eligible for funding during conformity lapse).

In order to redesignate an area as attainment, which EPA asserts it will do if the area attains the ozone standard by December 2007, the CAA requires EPA to make several statutorily prescribed determinations. One required determination is whether "the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A."[7] To comply with Section 175A, a maintenance plan must "provide for the maintenance of the national primary ambient air quality standard for [ozone] in the area concerned for at least 10 years after the redesignation."[8] The Act further requires that the applicable SIP be revised to ensure the maintenance of the standard for an additional ten years thereafter.[9]

In addition to the unauthorized administrative waiver of the two key nonattainment obligations concerning statutory and mobile sources, it remains unclear how EPA will be able to avoid the continuing procedural and substantive obligations under the Act to both plan for maintenance of the 8-hour standard and actually to achieve that goal. Indeed, with local governments taking experimental steps that have not been proven successful – unlike those contained within the Act itself – monitoring for the long run becomes even more important. A first step to ensuring that areas do no fall back into nonattainment would be to extend the prescribed monitoring program for 20 years, rather than the 5 or 10 suggested by EPA. For the three Triad counties currently under a maintenance plan, this requirement should be taken especially seriously and any attempt to shorten the 20-year statutory requirement should be summarily rejected. All areas should consider a wide-range of long-term efforts to meet the maintenance goals and requirements of the Act, especially given that VMT is projected to continue to increase over the next 20 years.

II. POTENTIAL LEGAL PROBLEMS WITH THE EAC APPROACH.

The product of decades of intense legislative effort and political compromise, the CAA is an exceedingly broad, complex, and sophisticated statute aimed not only at improving local air quality but also at addressing national issues such as the interstate transport of pollution. The 1990 Amendments to the Act were the most recent strengthening of this important law, intended to require states to take potentially difficult actions found necessary to clean the air. The 1990 Amendments introduced both a strict deadline structure for the strengthened version of the Act and important consequences for failing to comply with those deadlines. Under this scheme, EPA's deferral of the effective date for the nonattainment status of EAC participants is a contrivance that lacks any legal basis. That schedule is at the center of the Act's strategy for bringing nonattainment areas into attainment and triggers a schedule under which SIPs are due, control measures must be implemented, and air quality standards must be attained.

The EAC program exists wholly outside the structure and requirements of the Clean Air Act. Moreover, many aspects of the EAC approach directly conflict with important requirements of the Act, including statutory deadlines and consequences. As such, this illegal EPA "authorization" of states and local governments to substitute their preferred approaches to

[7] CAA § 107(d)(3)(E)(iv), 42 U.S.C. § 7407(d)(3)(E)(iv).
[8] CAA § 175(a), 42 U.S.C. § 7505a(a).
[9] CAA § 175(b), 42 U.S.C. § 7505a(b).

pollution control for the specific requirements of the Clean Air Act, may face legal challenge. Indeed, the Agency's failure to effectively designate nonattainment areas, its failure to timely require the nonattainment SIP measures specified in the Act, including new source review and transportation conformity, and its failure to require approvable maintenance plans would all be actionable.

Such avoidance of the Act's mandatory requirements has been routinely struck down by the courts. See, e.g., Sierra Club v. EPA, 294 F.3d 155 (D.C. Cir. 2002) (invalidating attainment deadline extension based on interstate pollution transport); EDF v. EPA, 167 F.3d 641 (D.C. Cir. 1999) (invalidating "grandfathering" exception to transportation conformity requirements); Sierra Club v. EPA, 129 F.3d 137 (D.C. Cir. 1997) (invalidating one-year grace period for nonattainment areas to meet Act's transportation conformity requirements). In 2001, the Supreme Court spoke directly to the provisions governing implementation of the revised 8-hour ozone standard, holding that the Act's provisions governing ozone nonattainment areas "eliminate[] regulatory discretion" that other areas of the Act may allow. Accordingly, "EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." Whitman v. American Trucking Ass'ns, 531 U.S. 457, 484-85 (2001)(holding that CAA provisions governing ozone nonattainment areas were meant to limit EPA discretion).

Based on this consistent legal precedent, it is clear that the deferral of the effectiveness of nonattainment designations, the waiver of the Act's mandatory control measures, and the waiver of the Act's maintenance requirements are all highly vulnerable to potential invalidation. The appropriateness of prompt voluntary local measures, however, does not hinge on the validity of the EAC program. Thus, rather than undermine local governments' commitment to finding local measures to control air pollution, threats to the validity of the program should energize local governments to work even harder toward significant air quality improvements. Such efforts also should be spurred by the unfortunate national history of missed mandatory deadlines to reduce pollution previously established under the Act. We believe the measures discussed below, and other measures like them, can bring about such benefits.

III. POSITIVE MEASURES LOCAL GOVERNMENTS SHOULD TAKE TO CLEAN THEIR AIR.

With the avoidance of the key CAA measures just discussed, the responsibility for making up for the emissions reductions that would result from these measures falls largely to the localities. This means that while EAC areas are allowed under the program to avoid, or at least delay, compliance with what they may consider to be painful control measures, they are not free to sit back and do nothing. They are left without the requirements of the Act to design their own strategies for bringing them into attainment with the health based standard for ozone by December 2007 or as expeditiously as practicable before that deadline. This is both a great opportunity and a great responsibility to take actions that will clean the air to the health-based standard and make sure it stays at a healthy level.

As stated at the outset, it is essential that any EACs in North Carolina include transportation and land use strategies to control VMT. The need for such mobile-source focussed action is evidenced by the ranking of the Triad and the Triangle as the United States' second and third most sprawling metro areas in a recent report by researchers at Rutgers and Cornell Universities.[10] These two areas, along with the three other EAC areas in North Carolina, couple extremely dispersed housing, employment, services, and other land uses with poor public transportation systems, requiring residents to drive substantial distances multiple times per day, simply to go about their daily lives. In the Triad area, this amounts to an average of 33.8 vehicle miles traveled per person per day, the same as in Atlanta, with less than one percent of commuters using transit to get to work.

Mobile source emissions resulting from North Carolina's sprawling land use patterns and ineffective public transit systems are responsible for significant amounts of NOx and VOCs, and in our urban areas often represent the primary source of these emissions. A review of North Carolina air quality data from EPA[11] shows that in 1999 on-highway mobile emissions were responsible for 60 percent of NOx emissions in 10 of the 11 Triad EAC counties.[12] A DAQ assessment of 1995 emissions for the Triad area reflected on-highway mobile emissions of 53 percent, showing that emissions from this sector have been on the rise in recent years.[13] On-highway mobile emissions in 1999 were also responsible for an even higher 72 percent of NOx emissions in the Fayetteville EAC area, and contribute 51 percent throughout all four of the State's EAC regions. On-highway mobile sources were also the second largest contributor of anthropogenic VOC emissions in EAC areas, contributing approximately 29 percent of VOC emissions throughout all the four regions in 1999, including as much as 42 percent of total VOC emissions in Fayetteville.[14]

While some transportation and land use measures will take several years or more to produce air quality benefits, they are nevertheless essential to ensure that clean air is attained and maintained in the following decades. To date, reductions in mobile source pollution has been due to improved vehicle technology concerning tailpipe emissions and fuel efficiency as the result of past federal mandates. Such improvements are projected to level off in the next few

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[10] See Ewing, Pendall & Cheng, "Measuring Sprawl and its Impact" (available at http://www.smartgrowthamerica.com/sprawlindex/MeasuringSprawl.PDF).

[11] Available at http://www.epa.gov/air/data.

[12] See Attachment 1, EPA's 1999 Annual NOx Emissions for EAC Regions in North Carolina. For this and the following NOx calculations, we have excluded Stokes County, which is responsible for an abnormally high level of point source emissions. Point sources are responsible for 97 percent of NOx emissions in Stokes County and 44 percent of total NOx emissions for the entire Triad EAC region. Stokes County is considered such an outlier that DAQ also has excluded it in presentations about emissions contributions in the Triad area. Furthermore, DAQ statistics have shown that overall point source emissions in the Triad EAC region, including Stokes County, will be reduced 87 percent between 1997 and 2007, with emissions from the utility sector reduced 91 percent. See Attachment 2, Triad EAC Region 1997 and 2007 NOx Emission Estimates, from NC DENR presentation (2002).

[13] See Attachment 3, 1995 Triad Area NOx Emissions without Stokes County, from NCDENR presentation (November 11, 2002)(the full presentation is available at http://www.co.forsyth.nc.us/EnvAffairs/eac/NC-EAC-presentation.ppt). Because our 1999 statistics are from EPA and the 1995 statistics DAQ uses are from the State, it is impossible to make a direct comparison between these numbers. These numbers do show, however, that as a general matter on-highway mobile emissions have been rising.

[14] See Attachment 4, EPA's Annual VOC Emissions for EAC Regions in North Carolina.

years as the "fleet" of vehicles on the road continues to modernize, resulting in a greater percentage of vehicles with the latest federal emissions requirements. Later this decade and continuing into the next decade, however, these tailpipe improvements are expected to be outstripped by ever-increasing VMT caused by more frequent and longer distance driving.[15] By taking a long-term approach, and beginning now to implement a mix of short-term and long-term transportation and land use strategies to reduce VMT growth, areas will be able to demonstrate that the 8-hour standard will be maintained well into the future after the attainment deadline as required under the Act.

Attachment 5 to this letter lists and explains six primary measures we believe the EAC signatories should consider in their stakeholder processes and include in their June 16th submissions to EPA:

1. Public Transportation
2. Pedestrian and Bicycle Facilities
3. Interconnected Street Networks
4. Mixed Use Development
5. Infill, Densification, and Downtown Revitalization
6. Community Schools

In general, these actions would serve to reduce auto trips by making transit, biking, and walking safer and more convenient. These suggestions are consistent with the list of approved Transportation Control Measures set out in 42 U.S.C. § 7408(f) of the Act (Attachment 6), and EPA's guidance document entitled "Improving Air Quality Through Land Use Activities," (EPA, Air and Radiation Office of Transportation and Air Quality, January 2001).[16] Appendix A to EPA's guidance document (Attachment 7), contains an excellent list of potential strategies.

IV. CONCLUSION

Aggressive coordinated action by local, state, and federal governments is necessary to address the significant air quality problems in North Carolina reflected in the impending 8-hour designation. For that reason, we support the initial planning attempts that localities are undertaking in order to find effective ways to locally control pollution. Indeed, voluntary discretionary measures such as those urged through EACs can be implemented at any time and can play a big role in achieving "clean air sooner." We urge North Carolina and its local governments to take all actions necessary, including the important transportation and land use strategies discussed above, to bring our air into compliance with the standard set to protect public health.

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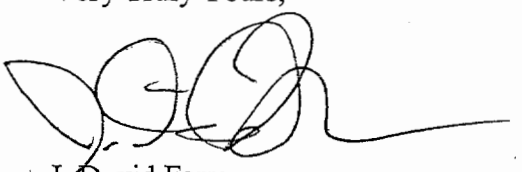
[15] See EPA Guidance: Improving Air Quality Through Land Use Activities, January 2001, at 10, Figure 1 (available at http://www.epa.gov/otaq/transp/landguid.htm).

[16] Available at http://www.epa.gov/otaq/transp/landguid.htm. See also http://www.epa.gov/otaq/transp/publicat.htm.

Please add us to your notification list for this matter and do not hesitate to contact us if you have any questions concerning this letter or if we can be of further assistance in helping to craft effective solutions to North Carolina's air quality challenges.

Very Truly Yours,



J. David Farren
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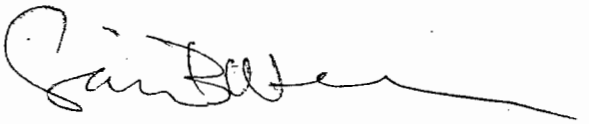

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Janet D'Ignazio, NC DOT
Stanley Meiburg, EPA Region 4
Kay Prince, EPA Region 4
Karen Borel, EPA Region 4

Attachments:
1. EPA's 1999 Annual NOx Emissions for EAC Regions in North Carolina
2. Triad EAC Region 1997 and 2007 NOx Emission Estimates, from NC DENR presentation (2002)
3. 1995 Triad Area NOx Emissions without Stokes County, from NC DENR presentation (November, 11, 2002)
4. EPA's 1999 Annual VOC Emissions for EAC Regions in North Carolina
5. Proposed Transportation and Land Use Strategies and Policies
6. Transportation Control Measures, § 7408(f) of the CAA
7. Appendix A to EPA's guidance document "Improving Air Quality Through Land Use Activities"

ATTACHMENT 1

EPA's 1999 Annual NOx Emissions for EAC Regions in North Carolina

Triad Region Excluding Stokes County (10 counties)	NOx Emissions (tons/year)	% of Total Emissions by Source
Highway Mobile NOx Emissions	51,284	60%
Point Source NOx Emissions	17,198	20%
Area Source NOx Emissions	4,966	6%
Off-Highway Mobile NOx Emissions	11,408	13%
Total:	84,856	

Mountain Region (5 counties)	NOx Emissions (tons/year)	% of Total Emissions by Source
Highway Mobile NOx Emissions	17,455	50%
Point Source NOx Emissions	13,768	39%
Area Source NOx Emissions	1,101	3%
Off-Highway Mobile NOx Emissions	2,700	8%
Total:	35,024	

Unifour Region (4 counties)	NOx Emissions (tons/year)	% of Total Emissions by Source
Highway Mobile NOx Emissions	12,808	29%
Point Source NOx Emissions	27,769	63%
Area Source NOx Emissions	833	2%
Off-Highway Mobile NOx Emissions	2,951	7%
Total:	44,361	

Fayetteville Region (1 county)	NOx Emissions (tons/year)	% of Total Emissions by Source
Highway Mobile NOx Emissions	9,312	72%
Point Source NOx Emissions	1,084	8%
Area Source NOx Emissions	771	6%
Off-Highway Mobile NOx Emissions	1,836	14%
Total:	13,003	

All EAC Regions in North Carolina Excluding Stokes County (Triad, Mountain, Unifour, and Fayetteville EAC regions)	NOx Emissions (tons/year)	% of Total Emissions by Source
Highway Mobile NOx Emissions	90,859	51%
Point Source NOx Emissions	59,819	34%
Area Source NOx Emissions	7,671	4%
Off-Highway Mobile NOx Emissions	18,895	11%
Grand Total:	177,244	

Source of Data: EPA's AirData Web site accessed on May 15, 2003.
http://www.epa.gov/air/data (NET Database)

EPA's 1999 Annual NOx Emissions for Stokes County, North Carolina *

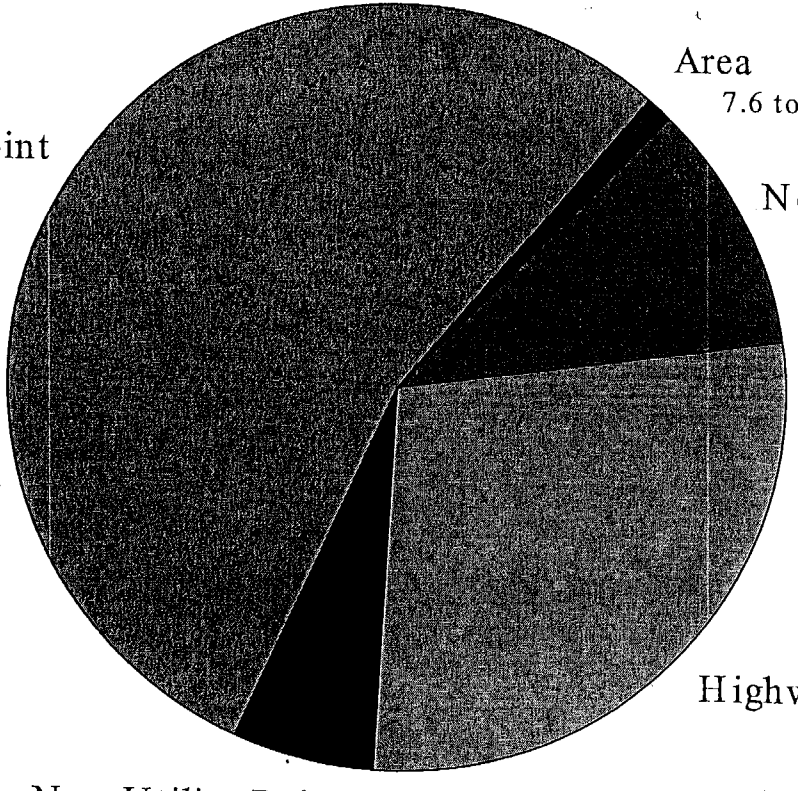
Stokes County, North Carolina	NOx Emissions (tons/year)	% of Total Emissions by Source
Highway Mobile NOx Emissions	1,420	2%
Point Source NOx Emissions	68,273	97%
Area Source NOx Emissions	108	< 1%
Off-Highway Mobile NOx Emissions	233	< 1%
Total:	70,034	

* Point sources in Stokes County generated approximately 44% of total NOx emissions for the entire Triad EAC region (11 counties) in 1999.

Source of Data: EPA's AirData Web site accessed on May 15, 2003.
http://www.epa.gov/air/data (NET Database)

ATTACHMENT 2

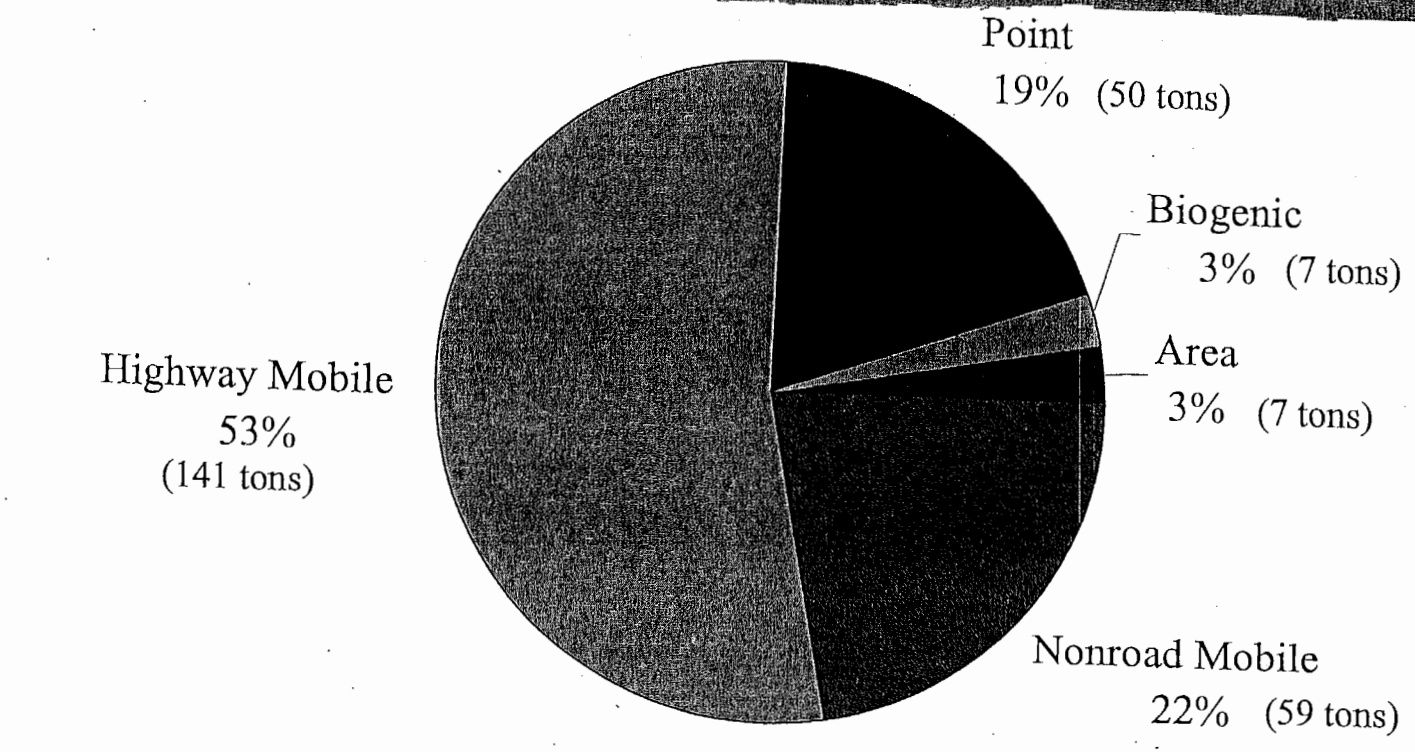
Triad EAC Region 1997 NOx Emission Estimates



Total emissions = 644 tons/day

ATTACHMENT 3

1995 Triad Area NOx Emissions without Stokes County



* Emissions are in Tons/Average Weekday

* Triad Area Counties include: Alamance, Caswell, Davidson, Davie, Forsyth, Guilford, Randolph, Rockingham and Yadkin

ATTACHMENT 4

EPA's 1999 Annual VOC Emissions (Anthropogenic) for EAC Regions in North Carolina

Triad Region (11 counties)	VOC Emissions (tons/year)	% of Total Emissions by Source
Highway Mobile VOC Emissions	34,027	28%
Point Source VOC Emissions	23,257	19%
Area Source VOC Emissions	56,477	46%
Off-Highway Mobile VOC Emissions	8,054	7%
Total:	121,815	

Mountain Region (5 counties)	VOC Emissions (tons/year)	% of Total Emissions by Source
Highway Mobile VOC Emissions	11,599	36%
Point Source VOC Emissions	4,993	15%
Area Source VOC Emissions	12,566	39%
Off-Highway Mobile VOC Emissions	3,353	10%
Total:	32,511	

Unifour Region (4 counties)	VOC Emissions (tons/year)	% of Total Emissions by Source
Highway Mobile VOC Emissions	9,046	22%
Point Source VOC Emissions	13,554	32%
Area Source VOC Emissions	17,792	42%
Off-Highway Mobile VOC Emissions	1,673	4%
Total:	42,065	

Fayetteville Region (1 county)	VOC Emissions (tons/year)	% of Total Emissions by Source
Highway Mobile VOC Emissions	7,922	42%
Point Source VOC Emissions	1,433	8%
Area Source VOC Emissions	8,370	44%
Off-Highway Mobile VOC Emissions	1,207	6%
Total:	18,932	

All EAC Regions in North Carolina (Triad, Mountain, Unifour, and Fayetteville EAC regions)	VOC Emissions (tons/year)	% of Total Emissions by Source
Highway Mobile VOC Emissions	62,594	29%
Point Source VOC Emissions	43,237	20%
Area Source VOC Emissions	95,205	44%
Off-Highway Mobile VOC Emissions	14,287	7%
Grand Total:	215,323	

Source of Data: EPA's AirData Web site accessed on May 15, 2003.
http://www.epa.gov/air/data (NET Database)

ATTACHMENT 5

SUGGESTED LOCAL TRANSPORTATION AND LAND USE POLICIES AND STRATEGIES

1. PUBLIC TRANSPORTATION

Objective: To reduce vehicle miles traveled by developing efficient user-friendly transit systems.

Implementation Strategies: (1) Integrate transportation planning with land use planning so public transit can make a comprehensive contribution to economic development and mobility. (2) Remove local barriers to densification in downtowns, infill areas, and transit stations and corridors. (3) Require local jurisdictions within a region to coordinate transportation planning. (4) Provide adequate funding for construction and operation of a convenient public transportation system tailored to meet community needs.

2. PEDESTRIAN AND BICYCLE FACILITIES

Objective: To encourage pedestrian and bicycle travel by increasing sidewalks, paths, crosswalks, protection from fast vehicular traffic, pedestrian-activated traffic signals and shading.

Implementation Strategies: (1) Reduce local zoning requirements for setbacks and minimum lot sizes to create stronger connection between building and sidewalks. (2) Reduce minimum parking requirements and provide other incentives for projects that encourage pedestrian, bicycle, and transit activity. (3) Require traffic-calming devices in new development.

3. INTERCONNECTED STREET NETWORKS

Objective: To encourage pedestrian and bike travel by providing more direct routes between locations. Also, alleviate traffic congestion by providing multiple routes between origins and destinations.

Implementation Strategies: (1) Require connected, narrower streets and sidewalks in new developments. (2) Require bicycle lanes and transit stops on larger streets in new developments.

4. MIXED USE DEVELOPMENT

Objective: To encourage pedestrian and transit travel by locating a variety of compatible land uses within walking distances of each other.

Implementation Strategies: (1) Remove legal impediments and barriers such as zoning regulations to mixed use and traditional neighborhood designs. (2) Provide incentives such as tax breaks and expedited approvals for the development and revitalization of mixed use and traditional neighborhoods. (3) Grant similar incentives for new mixed-use development that locates near transit and pedestrian oriented amenities.

5. INFILL, DENSIFICATION, AND DOWNTOWN REVITALIZATION

Objective: To encourage pedestrian and transit travel by locating new development in already developed areas, so that activities are closer together.

Implementation Strategies: (1) Require identification of priority investment areas where local governments will concentrate public investment in infrastructure projects. (2) Require fact-based decision making in order to ensure that major infrastructure projects conform to local land use plans. (3) Work with community builders, Main Street programs, and non-governmental organizations to encourage renewal and revitalization projects. (4) Prioritize highway system maintenance over new roads. (5) Allow for increased density for residential, retail, and employment generating uses in central areas and around transit. (6) Grant incentives such as accelerated permitting processing and infrastructure upgrades for development that focuses on existing urban areas and infill. (7) Allow for increased density within walking distance of transit centers.

6. COMMUNITY SCHOOLS

Objective: To reduce vehicle miles traveled and encourage biking and walking for students and parents by encouraging smaller community-based schools that are integrated into neighborhoods.

Implementation Strategies: (1) Eliminate minimum acreage requirements for school sites. (2) Cap student populations per facilities. (3) Require coordination among school boards and local governments to plan school sites and avoid conflicts with local planning goals. (4) Favor restoration and construction of community-based small schools over new construction of remote mega schools.

ATTACHMENT 6

The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section. Not later than six months after August 7, 1977, the Administrator shall revise and reissue criteria relating to concentrations of NO_2 over such period (not more than three hours) as he deems appropriate. Such criteria shall include a discussion of nitric and nitrous acids, nitrites, nitrates, nitrosamines, and other carcinogenic and potentially carcinogenic derivatives of oxides of nitrogen.

(d) Publication in Federal Register; availability of copies for general public

The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

(e) Transportation planning and guidelines

The Administrator shall, after consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, and with State and local officials, within nine months after November 15, 1990, and periodically thereafter as necessary to maintain a continuous transportation-air quality planning process, update the June 1978 Transportation-Air Quality Planning Guidelines and publish guidance on the development and implementation of transportation and other measures necessary to demonstrate and maintain attainment of national ambient air quality standards. Such guidelines shall include information on—

(1) methods to identify and evaluate alternative planning and control activities;

(2) methods of reviewing plans on a regular basis as conditions change or new information is presented;

(3) identification of funds and other resources necessary to implement the plan, including interagency agreements on providing such funds and resources;

(4) methods to assure participation by the public in all phases of the planning process; and

(5) such other methods as the Administrator determines necessary to carry out a continuous planning process.

(f) Information regarding processes, procedures, and methods to reduce or control pollutants in transportation; reduction of mobile source related pollutants; reduction of impact on public health

(1) The Administrator shall publish and make available to appropriate Federal, State, and local environmental and transportation agencies not later than one year after November 15, 1990, and from time to time thereafter—

(A) information prepared, as appropriate, in consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, regarding the formulation and emission reduction potential of transportation control measures related to criteria pollutants and their precursors, including, but not limited to—

(i) programs for improved public transit;

(ii) restriction of certain roads or lanes to, or construction of such roads or lanes for use by, passenger buses or high occupancy vehicles;

(iii) employer-based transportation management plans, including incentives;

(iv) trip-reduction ordinances;

(v) traffic flow improvement programs that achieve emission reductions;

(vi) fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit service;

(vii) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use;

(viii) programs for the provision of all forms of high-occupancy, shared-ride services;

(ix) programs to limit portions of road surfaces or certain sections of the metropolitan area to the use of non-motorized vehicles or pedestrian use, both as to time and place;

(x) programs for secure bicycle storage facilities and other facilities, including bicycle lanes, for the convenience and protection of bicyclists, in both public and private areas;

(xi) programs to control extended idling of vehicles;

(xii) programs to reduce motor vehicle emissions, consistent with subchapter II of this chapter, which are caused by extreme cold start conditions;

(xiii) employer-sponsored programs to permit flexible work schedules;

(xiv) programs and ordinances to facilitate non-automobile travel, provision and utilization of mass transit, and to generally reduce the need for single-occupant vehicle travel, as part of transportation planning and development efforts of a locality, including programs and ordinances applicable to new shopping centers, special events, and other centers of vehicle activity;

(xv) programs for new construction and major reconstructions of paths, tracks or areas solely for the use by pedestrian or other non-motorized means of transportation when economically feasible and in the public interest. For purposes of this clause, the Administrator shall also consult with the Secretary of the Interior; and

(xvi) program to encourage the voluntary removal from use and the marketplace of pre-1980

model year light duty vehicles and pre–1980 model light duty trucks.

(B) information on additional methods or strategies that will contribute to the reduction of mobile source related pollutants during periods in which any primary ambient air quality standard will be exceeded and during episodes for which an air pollution alert, warning, or emergency has been declared;

(C) information on other measures which may be employed to reduce the impact on public health or protect the health of sensitive or susceptible individuals or groups; and

(D) information on the extent to which any process, procedure, or method to reduce or control such air pollutant may cause an increase in the emissions or formation of any other pollutant.

(2) In publishing such information the Administrator shall also include an assessment of—

(A) the relative effectiveness of such processes, procedures, and methods;

(B) the potential effect of such processes, procedures, and methods on transportation systems and the provision of transportation services; and

(C) the environmental, energy, and economic impact of such processes, procedures, and methods.

(3) The Secretary of Transportation and the Administrator shall submit to Congress by January 1, 1993, and every 3 years thereafter a report that—

(A) reviews and analyzes existing State and local air quality-related transportation programs, including specifically any analyses of whether adequate funding is available to complete transportation projects identified in State implementation plans in the time required by applicable State implementation plans and any Federal efforts to promote those programs;

(B) evaluates the extent to which the Department of Transportation's existing air quality-related transportation programs and such Department's proposed budget will achieve the goals of and compliance with this chapter; and

(C) recommends what, if any, changes to such existing programs and proposed budget as well as any statutory authority relating to air quality-related transportation programs that would improve the achievement of the goals of and compliance with this chapter.

(4) In each report to Congress after the first report required under paragraph (3), the Secretary of Transportation shall include a description of the actions taken to implement the changes recommended in the preceding report.

(g) Assessment of risks to ecosystems

The Administrator may assess the risks to ecosystems from exposure to criteria air pollutants (as identified by the Administrator in the Administrator's sole discretion).

(h) RACT/BACT/LAER clearinghouse

The Administrator shall make information regarding emission control technology available to the States and to the general public through a central database. Such information shall include all control technology information received pursuant to State plan provisions requiring permits for sources, including operating permits for existing sources.

(July 14, 1955, c. 360, Title I, § 108, as added Dec. 31, 1970, Pub.L. 91–604, § 4(a), 84 Stat. 1678, and amended Aug. 7, 1977, Pub.L. 95–95, Title I, §§ 104, 105, Title IV, § 401(a), 91 Stat. 689, 790; Nov. 15, 1990, Pub.L. 101–549, Title I, §§ 108(a) to (c), (o), 111, 104 Stat. 2465, 2466, 2469, 2470.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1970 Acts. House Report No. 91–1146 and Conference Report No. 91–1783, see 1970 U.S. Code Cong. and Adm. News, p. 5356.

1977 Acts. House Report No. 95–294 and House Conference Report No. 95–564, see 1977 U.S. Code Cong. and Adm. News, p. 1077.

1990 Acts. Senate Report No. 101–228, House Conference Report No. 101–952, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 3385.

Codifications

Section was formerly classified to section 1857c–3 of this title.

Reference in subsec. (e) in the original to "enactment of the Clean Air Act Amendments of 1989" has been codified as "November 15, 1990" as manifesting Congressional intent in the date of the enactment of Pub.L. 101–549, Nov. 15, 1990, 104 Stat. 2399, popularly known as the Clean Air Act Amendments of 1990.

Effective Dates

1990 Acts. Amendment by Pub.L. 101–549 effective Nov. 15, 1990, except as otherwise provided, see section 711(b) of Pub.L. 101–549, set out as a note under section 7401 of this title.

1977 Acts. Amendment by Pub.L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub.L. 95–95, set out as a note under section 7401 of this title.

Savings Provisions

Suits, actions or proceedings commenced under this chapter as in effect prior to Nov. 15, 1990, not to abate by reason of the taking effect of amendments by Pub.L. 101–549, except as otherwise provided for, see section 711(a) of Pub.L. 101–549, set out as a note under section 7401 of this title.

Prior Provisions

A prior section 108 of Act July 14, 1955, was renumbered section 115 by Pub.L. 91–604 and is set out as section 7415 of this title.

ATTACHMENT 7

APPENDIX A EXAMPLES OF LAND USE POLICIES AND STRATEGIES

This list of examples of land use strategies and policies has been borrowed from a June, 1995 report by JHK & Associates for the California Air Resources Board entitled, "Transportation-Related Land Use Strategies to Minimize Mobile Source Emissions: An Indirect Source Research Study." This report is available on the U.S. Department of Energy's "Sustainable Developments website at http://www.sustainable.doe.gov/pdf/arb-report/arb-overview.htm

Some examples of Land Use Strategies include:

- Concentrated activity centers: Encourage pedestrian and transit travel by creating "nodes" of high density mixed development, that can be more easily linked by a transit network.
- Strong downtowns: Encourage pedestrian and transit travel by making the central business district a special kind of concentrated activity center, that can be the focal point for a regional transit system.
- Mixed-use development: Encourage pedestrian and transit travel by locating a variety of compatible land uses within walking distance of each other.
- Infill and densification: Encourage pedestrian and transit travel by locating new development in already developed areas, so that activities are closer together.
- Increased density near transit stations: Encourage transit travel by increasing development density within walking distance (0.25 to 0.50 miles) of high capacity transit stations, and incorporate direct pedestrian access.
- Increased density near transit corridors: Encourage transit travel by increasing development density within walking distance (0.25 to 0.50 miles) of a high capacity transit corridor.
- Pedestrian and bicycle facilities: Encourage pedestrian and bicycle travel by increasing sidewalks, paths, crosswalks, protection from fast vehicular traffic, pedestrian-activated traffic signals, and shading.

♦ Interconnected street network:	Encourage pedestrian and bicycle travel by providing more direct routes between locations. Also, alleviate traffic congestion by providing multiple routes between origins and destinations.
♦ Strategic parking facilities:	Encourage non-automobile modes of transit by limiting the parking supply, and encourage carpooling by reserving parking close to buildings for carpools and vanpools.

Some examples of Land Use Polices include:

Encourage focused higher density by:

- ♦ Allowing transfer of unused development density capacity in outlying areas to permit development density above maximum limits near central areas and transit (zoning/regulations and non-monetary incentives);
- ♦ Allowing increased density for residential, retail, and employment generating uses in central areas and around transit (zoning/regulations and non-monetary incentives);
- ♦ Setting minimum densities for residential, retail, and employment generating uses in central areas and around transit (zoning/regulations);
- ♦ Requiring no net decrease in residential density for redevelopment (zoning/regulations);
- ♦ Stating densities in terms of square feet of land per dwelling unit, rather than minimum lot size, to encourage clustering (zoning/regulations);
- ♦ Granting incentives (e.g., reduced parking requirements, accelerated permit processing, infrastructure upgrades) for development that focuses on existing urban areas and infill (non-monetary incentives);
- ♦ Adjusting development impact fee structures or giving tax breaks to encourage infill and increased density development near transit and activity centers, and to discourage outlying development (monetary incentives).

Encourage mixed-use zones by:

- ♦ Allowing mixed use, which is now prohibited in many places (zoning/regulations);
- ♦ Requiring mixed uses, with certain percentages of residential, public, and commercial uses in target areas (zoning/regulations);
- ♦ Using fine-grained zoning to achieve mixed use while ensuring residential zones are buffered from heavy industrial zones with light industrial and commercial zones (zoning/regulations);

- Using mixed-use overlay zoning, to add a second use to an area that is primarily in another use, e.g., commercial corridors along major arterials in a primarily residential area (zoning/regulations);

- Granting incentives (e.g., reduced parking requirements, accelerated permit processing, infrastructure upgrades) for development that locates transit- or pedestrian-oriented amenities, like housing or child care near commercial uses and pedestrian-oriented design (non-monetary incentives);

- Adjusting development impact fee structures or giving tax breaks to encourage mixed use (monetary incentives).

Encourage pedestrian, bicycle, transit, and carpooling activity by:

- Requiring connected, narrower streets with trees and sidewalks in new development (zoning/regulations);

- Requiring bicycle lanes and transit stops on larger streets in new development (zoning/regulations);

- Requiring traffic-calming devices in new development; e.g., textured paving at crossings, frequent intersections with pedestrian-activated traffic signals, and traffic circles (zoning/regulations);

- Reducing requirements for setbacks and minimum lot sizes to create a stronger connection between buildings and sidewalks (zoning/regulations and non-monetary incentives);

- Requiring pedestrian scale signs in pedestrian- and transit-oriented areas (zoning/regulations);

- Reducing minimum parking requirements near transit hubs and for projects providing features that encourage pedestrian, bicycle, and transit activity (zoning/regulations and non-monetary incentives);

- Setting parking maximums in transit- and pedestrian-oriented areas (zoning/regulations);

- Requiring preferential parking for carpools (zoning/regulations).

For more examples of applications of land use activities that may reduce reliance on automobiles and thus the air quality impacts of driving, see the following sources:

Smart Growth Network's Case Studies page
http://www.smartgrowth.org/casestudies/casestudy_index.html

Sierra Club's "Smart Choices or Sprawling Growth: A 50 State Survey of Development"
http://www.sierraclub.org/sprawl/50statesurvey/intro.asp

Center of Excellence for Sustainable Development Land Use Planning Success Stories
http://www.sustainable.doe.gov/landuse/lusstoc.shtml

Urban Land Institute's Smart Growth: News, Tools and Hot Links
http://www.uli.org/indexJS.htm

Sprawl Watch Clearinghouse Best Practices page
http://www.sprawlwatch.org/bestpractices.html

White House Livable Communities web site
http://www.livablecommunities.gov

USEPA Office of Solid Waste and Emergency Response Brownfields website
http://www.epa.gov/brownfields

EXAMPLES OF VMT AND LAND USE-RELATED MEASURES

Transportation is the largest single source of NOx emissions, the key ozone precursor, in the nonattainment areas participating in the EAC program. To ensure timely attainment and maintenance of the new ozone standard in these rapidly growing cities, it is important that the EAC local measures addressing transportation and land use include meaningful commitments to ensure that VMT increases will not offset other emission reduction strategies. To effectively address escalating per capita VMT in these areas, it is essential that transportation and land use planning be integrated to encourage alternatives to single occupant auto travel.

Consistent with the recommendations in our comment letter submitted to state and local officials in May of 2003, each EAC area should take prompt, meaningful and enforceable steps in the areas of transportation and land use planning to address the issue of increasing per capita VMT. *See EPA Guidance: Improving Air Quality Through Land Use Activities, Jan. 2001.*

In the transportation planning arena, such steps would include one or more of the following commitments:

- Develop a plan to increase by an agreed upon percentage the number of trips via transit in the metro area over the next decade.
- Develop a plan to increase by an agreed upon percentage the amount of local funding over the next decade for transit, bike and pedestrian projects.
- Institute and fund within a year a program of employee incentives to encourage alternatives to single occupant commuting including such measures as parking cash out, bus passes or other programs.

In the land use planning arena, such steps would include one or more of the following commitments:

- Amend local land use plans within one year to remove impediments to and provide incentives for TND, TOD and other mixed use developments in urban areas and along transit routes.
- Amend local land use plans within one year to support infill, densification and downtown revitalization.
- Amend local land use and transportation plans within one year to require interconnected street networks.
- Amend local land use plans within one year to require community schools.
- Establish a review mechanism in the permit review and zoning variance processes with established standards to evaluate the air and transportation impacts of major new development projects.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 14 2002

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Schedule for 8-Hour Ozone Designations and its Effect on Early Action Compacts

FROM: Jeffrey R. Holmstead
Assistant Administrator

TO: Regional Administrators, Regions I-X

The purpose of this memorandum is to inform State and local air pollution control Agencies and Tribes (States and Tribes) about the Environmental Protection Agency's (EPA's or Agency's) schedule for designating areas for the 8-hour ozone National Ambient Air Quality Standards (NAAQS or standard) and the impact of the designation schedule on areas that are developing early action compacts (compacts). Please share this memorandum with your States and Tribes. This memorandum does not replace earlier guidance on the designation process and determining nonattainment area boundaries based on case-by-case application of air quality-related factors and presumptions. These earlier memoranda, titled "Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standards" dated March 28, 2000 and "Guidance on 8-Hour Ozone Designations for Indian Tribes" dated July 18, 2000, provide more detail on these issues and are located at http://www.epa.gov/ttn/oarpg.

Part A of this memorandum describes the schedule for designations, Part B addresses designation of Tribal areas and Part C addresses the effect of this schedule on States and Tribes that are developing compacts pursuant to the Texas "Protocol for Early Action Compacts Designed to Achieve and Maintain the 8-Hour Ozone Standard" (protocol) endorsed by EPA on June 19, 2002. The protocol can be found at http://www.epa.gov/eartlr6/6pd/air/pd-l/8hourozone.pdf.

A. Schedule for Designations for the 8-Hour Ozone NAAQS

On May 30, 2002 representatives of nine environmental organizations filed a notice of citizen suit under the Clear Air Act (Act) alleging that the Administrator failed to promulgate air

quality designations by the required statutory deadline.[1] On November 13, 2002, the nine environmental groups filed their lawsuit in the U.S. District Court for the District of Columbia. The EPA and the environmental groups have agreed upon a schedule for EPA to promulgate air quality designations for the 8-hour ozone standards by April 15, 2004. This agreement is embodied in a consent decree that was lodged with the U.S. District Court for the District of Columbia on November 13, 2002. In accordance with §113(g) of the Act, prior to finalizing the consent decree, EPA will publish a notice in the Federal Register providing a 30-day period for public review. If the public review results in revisions to the consent decree, EPA will modify this guidance as appropriate.

The EPA is now requesting that each State Governor and Tribal Chief or Leader submit their updated, revised, or new designation recommendations and documentation to the Regional Administrator of the appropriate Regional Office by April 15, 2003. It should be noted that State recommendations do not apply to Indian country. The recommendations should generally be based on 2000-2002 quality assured, Federal reference or equivalent air quality monitoring data. This date will provide time for States and Tribes to quality assure the data for use in developing their recommendations and for EPA to carefully review and evaluate each recommendation prior to promulgating designations. To the extent that 2001-2003 air quality data are available and quality assured at the time of final designations, EPA will use 2001-2003 data when promulgating the designations. Therefore, EPA encourages Regional Offices, States and Tribes to prioritize and accelerate quality assurance of 2003 ozone monitoring data for use in promulgating designations. In the case where a State or Tribe does not submit a recommendation by April 15, 2003, EPA will promulgate the designation it deems appropriate.

In accordance with the Act, EPA will review the recommended designations and may make modifications as deemed necessary. If EPA determines that a modification to a recommendation is necessary, EPA will notify the State or Tribe no later than 120 days prior to promulgating the designations, which will provide an opportunity for the State or Tribe to demonstrate why EPA's modification is not appropriate. The EPA anticipates that it would provide such notification no later than October 15, 2003.

The EPA believes this timetable for promulgating designations is reasonable and appropriate and provides adequate time for States, Tribes, and local communities to develop effective ozone abatement strategies. Accordingly, EPA believes that there is no need for legislative action to alter the statutory deadline for ozone designations or related implementation

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[1]Section 6103 of the Transportation Equity Act for the 21st Century ("TEA-21") provided that EPA was required to designate areas for the 8-hour ozone NAAQS no later than July 18, 2000. See CAA section 107 Note. As part of Pub. L. 106-377, enacted in October 2000, Congress prohibited EPA from spending funds to designate areas for the 8-hour NAAQS until the earlier of a decision by the Supreme Court in Whitman v. American Trucking Assoc. or June 15, 2001. The Supreme Court issued its decision in Whitman v. American Trucking Assoc. on February 27, 2001.

requirements. In addition, EPA believes that it is possible to harmonize implementation of the 8-hour ozone and particulate matter NAAQS for 2.5 microns or less ($PM_{2.5}$) without seeking legislation because EPA will work with States to ensure that area designations for both NAAQS will occur in 2004. Indeed, the designation of areas for the $PM_{2.5}$ standard by December 2004 is one of the Agency's highest priorities, due to the serious public health implications of $PM_{2.5}$ exposure and the corresponding importance of initiating the air quality planning process for both the ozone and $PM_{2.5}$ standards. This will enable States and Tribes to plan for implementation of both NAAQS at the same time. In addition, EPA intends to promulgate an implementation rule and release guidance addressing the 8-hour ozone program by the end of 2003 to aid States in planning for implementation prior to promulgation of designations.

The EPA is committed to ensuring that all stakeholders have an opportunity to participate in the designation process for the 8-hour ozone NAAQS, and that State, local and Tribal officials have ample time to comply with obligations that are triggered by designations. States are encouraged to involve their stakeholders in developing their recommendations. Regional Offices should work with States and Tribes, particularly those Tribes located in or near an area where a monitor is recording a violation of the 8-hour ozone NAAQS.

B. Designation of Tribal Areas

Tribes have raised a number of concerns and questions to EPA about the designation process in discussions held by the Tribal Designations and Implementation Work Group. For instance, many Tribes believe that consolidated metropolitan statistical area (C/MSA) boundaries should not include reservations which are often politically and economically not integrated with the surrounding or adjacent urban area. The C/MSA presumption for the recommended nonattainment area plus nearby contributing areas in EPA's guidance recognizes the need for broader nonattainment areas associated with urban areas because of transport of pollution and precursor emissions within and into urban areas, widespread poor air quality in and near urban areas and protection of health and welfare of citizens living in the area. While EPA's guidance establishes a presumption that the metropolitan area[2] is the initial default area, the guidance offers a method to arrive at a different conclusion other than C/MSA through case-by-case evaluation and documentation based on the factors in the guidance. Therefore, a Tribe may make a recommendation that their area not be included in a C/MSA nonattainment area and/or that a nonattainment designation is not appropriate for the area by addressing the factors in the guidance. Another concern that Tribes have raised with the designation process is that Tribes may not have the resources to do the detailed analysis necessary to prepare recommendations. Therefore, EPA offers to work with Tribes on their recommendation upon request.

Tribes are encouraged, but not required, to submit designation recommendations for their reservations, or other area under their jurisdiction, to EPA. The Tribal Authority Rule (TAR)

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[2] "Metropolitan area" means the Metropolitan Statistical Area (MSA) or, in areas with multiple contiguous MSAs, the Consolidated Metropolitan Statistical Area (CMSA).

offers flexibility to Tribes for specific plan submittal and implementation deadlines for NAAQS-related requirements, including but not limited to such deadlines in CAA sections 110(a)(1), 172(a)(2), 182, 187, 189, and 191. However, EPA is required by the Act and the consent decree to make designations according to a timetable. Therefore, if a Tribe wishes to participate in the designation process, it must submit a recommendation in time for EPA to consider that recommendation when making a designation. In cases where Tribes do not make recommendations, the EPA, after consultation with the respective Tribe(s), will promulgate the designation it deems appropriate.

The EPA will continue to work with the Tribes to address their concerns, consistent with the TAR. Because many of the Tribal concerns about designations will be area specific, it is important for the Tribes to work with their EPA Regional Office on their recommendations. For more information on ozone designations for Tribes, see EPA's Guidance on 8-Hour Ozone Designations for Indian Tribes, available on the Office of Air and Radiation's Tribal AIR website, www.epa.gov/oar/tribal/airprogs/tribe8hd.html. The EPA plans to contact Tribes regarding consultation prior to promulgating actual designations.

C. Early Action Compacts

In this section, EPA is addressing how it anticipates the designation schedule will work for areas that develop voluntary 8-hour compacts, as provided in the protocol. The EPA endorsed this protocol on June 19, 2002. The purpose of a signed 8-hour compact is to provide a local area with flexibility to control air emissions from their sources and offer a means to achieve cleaner air faster than the Act would otherwise require. Areas that currently approach or monitor exceedances of the 8-hour ozone standard, but are designated attainment and "clean" for the 1-hour ozone standard, i.e., no monitored violations, would be eligible to qualify for the compact approach, provided the milestones and schedules discussed in the next section of this memorandum are met. Under this approach, 8-hour air quality plans would be developed consistent with a cooperative agreement between local, State or Tribe and EPA officials. These early 8-hour plans would consist of local, enforceable measures that would achieve air quality reductions earlier than otherwise would be required and that would be approved as part of the State implementation plan (SIP). In cases where a Tribe elects to participate, the local controls would be included as part of the Tribal implementation plan (TIP). For participating areas that are monitoring a violation of the 8-hour ozone standard, EPA would recognize the local area's commitment to early action by provisionally deferring the effective date of the nonatttainment designation. The deferral of the effective date of the designation would be contingent upon the participating area's meeting all terms and milestones of the compact. The Agency believes that these compacts can result in early environmental progress, and we continue to support local areas' commitments to develop plans that are designed to achieve clean air faster than the Act would otherwise require.

We strongly encourage States, Tribes and local areas to begin broad-based stakeholder outreach early, and to maintain an effective and inclusive collaborative process. The early action

program is based upon, and cannot effectively operate without, broad-based support from all interests.

One of the principles of the protocol concerns deferral of the effective date of the nonattainment designation for areas that are in compliance with applicable milestones in the compact. For these areas, EPA would plan to defer the effective date of the nonattainment designation on a rolling basis such that each deferral is linked to a key milestone, as described below in the next section of this memorandum. We have included a schedule for deferrals later in this memorandum in the section entitled "Provisional Deferral of the Effective Date of Nonattainment Designation."

Key Compact Milestones and Schedules

Below EPA sets forth the key milestones, which are also outlined in the protocol, that should be included in each compact. The milestones have been supplemented as described below and in a letter dated October 18, 2002, from Gregg Cooke, EPA, to Robert Huston, Texas Commission on Environmental Quality. The Regional Offices should work closely with States, Tribes and local areas to emphasize the importance of adhering to these critical milestones and schedules, as well as the importance of implementing an effective stakeholder process.

1. December 31, 2002 - The compact must be completed, signed by local, State or Tribal and EPA officials, and submitted to EPA no later than December 31, 2002. Areas that submit compacts after that date will not qualify for the deferred effective date. These agreements represent commitments of States and local areas or Tribes that culminate in the development of the SIPs or TIPs that will achieve local reductions earlier than otherwise required, and which demonstrate attainment of the 8-hour ozone NAAQS by December 31, 2007. The compacts should follow the principles outlined in the protocol and should address the following components described in the protocol: milestones and reporting; emissions inventory; modeling; control strategies; maintenance for growth; public involvement; and local, State or Tribal and EPA commitments.

2. June 16, 2003 - The protocol requires that, after all adopted Federal and State or Tribal controls that have been or will be implemented by the attainment date of December 31, 2007 are accounted for in the modeling, the local area must adopt additional local controls, as necessary, to achieve reductions earlier than otherwise would be required, and to demonstrate attainment of the 8-hour ozone NAAQS by December 31, 2007. Therefore, by June 16, 2003, the first step in complying with this requirement, the local area will identify and describe the local control measures that are being considered during the local planning process. The June 16, 2003 deadline for describing the control measures under consideration must be met to maintain eligibility in the program. While failure to list a measure at this stage would not preclude its adoption later, it is important to develop a reasonably complete initial list of measures. We recognize that the modeling may not be complete at this stage, and that control measures may need to be modified. This milestone, therefore, will provide the public with clear information on

the measures under consideration, will help ensure that interested parties are fully aware of the level of effort and local commitment that is necessary, and will demonstrate that the local area is making progress toward meeting the critical March 31, 2004 deadline for adoption of local measures.

3. March 31, 2004 - The resulting local plan must be completed and submitted to the State or Tribal leader by March 31, 2004 for inclusion in the SIP or TIP and a copy must be provided to EPA by that date. The local plan shall include measures that are specific, quantified, and permanent, and that if approved by EPA, will be Federally enforceable as part of the SIP or TIP. The March 31, 2004 submission also must include specific implementation dates for the adopted local controls. In addition, the local plan must include detailed documentation supporting the plan and reports outlined in the protocol, as well as a modeling analysis based on local controls demonstrating attainment of the 8-hour ozone NAAQS by December 31, 2007.

4. December 31, 2004 - No later than December 31, 2004, States or Tribes will submit to EPA a SIP or TIP consisting of the local plan, including all adopted control measures, and a demonstration that the area will attain the 8-hour ozone standard by December 31, 2007. If a SIP or TIP has been submitted by that date, EPA will review it for completeness and approvability.

5. September 30, 2005 - EPA will take final action on any SIP or TIP revisions submitted by December 31, 2004, pursuant to the compact.

6. December 31, 2005 - No later than December 31, 2005, the area will implement the local control measures that have been incorporated into the SIP or TIP. The EPA strongly recommends that these local measures be implemented earlier (no later than the beginning of the local area's 2005 ozone season) to ensure that the area will have timely and sufficient air quality data (2005-2007) to show attainment by December 31, 2007.

7. June 30, 2006 progress assessment - The protocol requires 6-month progress reports. No later than June 30, 2006, the State or Tribe must submit to EPA a report attesting to the local area's progress since the December 31, 2005 milestone. To determine whether the effective date of the nonattainment designations should continue to be deferred, EPA will review the mid-2006 report to ensure that the area continues to implement its control measures, that emission reductions attributed to local measures are being achieved, and that improvements in air quality are being made. This 6-month report should contain sufficient information to ensure that EPA can make a comprehensive assessment of air quality progress in the local area.

8. December 31, 2007 - No later than December 31, 2007, the area must attain the 8-hour ozone NAAQS. If the area has attained the standard by December 31, 2007, EPA will withdraw the deferred nonattainment designation and replace it with an attainment designation. If the area fails to attain by this date, the nonattainment designation will become effective on April 15, 2008. In addition, pursuant to the terms of the compact, the State must submit a revised attainment demonstration SIP for the nonattainment area by December 31, 2008.

Provisional Deferral of the Effective Date of Nonattainment Designation

If an area meets the first two compact milestones, EPA anticipates that it will propose in October 2003 to defer the effective date of the nonattainment designation for that area until September 30, 2005, contingent upon the area's submission of local control measures by March 31, 2004, as required by the third compact milestone. If the area submits the required control measures, and after consideration of public comment, EPA intends to take final action by April 15, 2004 on the deferred effective date.

Under the terms of the protocol, EPA has committed to approve the SIP or TIP by September 30, 2005. Assuming the SIP or TIP is approvable, the Agency intends to propose, as part of the approval action, the second deferral of the effective date until December 31, 2006. This will allow the Agency time to determine if implementation of control measures has occurred by the December 31, 2005 milestone before further extending the effective date. If the June 30, 2006 progress assessment (described in the previous section) has been submitted, implementation has occurred, and air quality improvement is taking place, EPA will propose and, if appropriate, take final action on the third deferral of the effective date until April 15, 2008. By that date EPA will determine if an area has attained the 8-hour ozone NAAQS by December 31, 2007, as required by the protocol.

In the event of any missed key milestone, EPA will take action to propose and promulgate a finding of failure to meet the milestone, and to withdraw any deferred effective date of the nonattainment designation shortly after the missed milestone. The deferred effective dates will expire unless EPA determines, as part of the rulemaking actions described above, that all intervening milestones have been achieved. If any milestone is missed and EPA withdraws the deferred effective date, thereby triggering a nonattainment designation and applicable statutory requirements, a nonattainment SIP would have to be submitted to EPA within 1 year of the new effective date of the nonattainment designation. A timeline of key compact milestones and deferred effective dates is attached.

Questions on designations should be directed to Sharon Reinders at 919/541-5284. Questions on 8-hour compacts should be directed to David Cole at 919/541-5565.

cc: Air Directors, Regions I-X
Margo Oge, OTAQ

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File Name: I:\SEC\COLE\8HRO3_EACs11_13_02.WPD November 13, 2002

Early Action Compact Timeline